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IN THE

Supreme Court of the United States

No. 214 October Term, 1945

JACKSON & PERKINS COMPANY,
Petitioner,

vs.

MUSHROOM TRANSPORTATION COMPANY, INC., WILLIAM BICKLEY, trading as BICKLEY'S AUTO EXPRESS,
Respondents.

BRIEF ON BEHALF OF MUSHROOM TRANSPORTATION COMPANY, ONE OF THE RESPONDENTS, OPPOSING PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF MATTER INVOLVED

This brief is filed in opposition to a petition by Jackson & Perkins Company for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania, entered March 19, 1945, reported in 351 Pa. 583, which affirmed the judgment of the Court of Common Pleas No. 5 of Philadelphia County, Pennsylvania in favor of the respondents. A petition for re-argument was refused by the Supreme Court of Pennsylvania on April 9, 1945.

The action was instituted by petitioner against Mushroom Transportation Company, Inc. and William Bickley, individually and trading as Bickley's Auto Express, both common carriers by motor truck, to recover damages in the amount of $2,539.19 for an alleged loss of a shipment of

dormant rosebushes claimed to have resulted from freezing.

The case was tried before a judge of the Court of Common Pleas of Philadelphia County without a jury and resulted in a finding in favor of both respondents. Exceptions to the adjudication were dismissed by the court in banc. Petitioner appealed to the Supreme Court of Pennsylvania which, in a unanimous opinion written by Mr. Justice William B. Linn, affirmed the judgment.

Petitioner, in its recital of the facts, has placed a construction upon the testimony which presents it in a light most favorable to petitioner, ignoring the rule that the findings of fact of the trial judge, affirmed by the court in banc, are entitled to the same weight as the verdict of a jury (R. p. 351). Petitioner has erroneously assumed as true the testimony of its so-called experts and other witnesses, for which there are no supporting findings by the trial judge, and, as will be pointed out, has drawn unsupportable conclusions therefrom in its argument. In addition, petitioner has omitted reference to vital facts found by the trial court which are indispensable to a proper grasp of the case.

The facts as found, for which there is ample support in the record, are as follows:

The rosebushes involved were grown in a field in California (79a, 80a). In November and December, 1941, they were removed from the field in California and packed in damp, moist moss in wooden boxes 20″ by 22″ by 3½′, lined with a sheet of paper with excelsior on top, and wrapped in a single covering of wrapping paper. They were then shipped to petitioner in Newark, N. Y. (63a, 66a, 79a, 84a, 85a, 102a, 114a). When they arrived in Newark the boxes were not unpacked but were placed in a cold storage room in petitioner's plant where a temperature of thirty-three degrees was maintained (78a-81a, 102a, 103a).

On the morning of January 5, 1942, in the dead of winter, 32 boxes of these bushes were removed by petitioner from its cold storage room in the same condition in which they had arrived and were delivered to Goetzman &

Newman, a common carrier, under a bill of lading prepared by petitioner, consigned to Florex Gardens, North Wales, Pa. (11a, 81a, 82a, 84a). No additional moss or excelsior was added to the boxes when they were delivered to Goetzman & Newman. The only additional protection given the boxes by petitioner was an extra sheet of wrapping paper on the outside. At that time the moss in the boxes contained moisture (84a, 85a, 114a).

Without previous notification, Goetzman & Newman delivered the cartons to the terminal of Mushroom in Rochester in the forenoon of January 5, 1942, and unloaded them onto a platform inside the terminal (82a-84a, 236a, 237a, 307a). This terminal is located in a building with a frontage on the street of 75′ and extending 200′ in depth. The platform, on which these boxes were placed by Goetzman & Newman, is in the rear of the building and is 75′ wide and extends out into the interior of the building a distance of 64′. The platform is not open to the street and the front door of the building is 140′ distant from the front of the platform (227a, 228a, 236a, 237a, 238a, 240a). When Goetzman & Newman unloaded the boxes, it placed them against the interior of the solid wall of the building. There are no windows in the wall and, because of a building set-off due to a railroad siding, it is not an outside wall (227a, 237a, 238a, 240a, 245a, 246a).

The regular scheduled run of Mushroom between Rochester, N. Y., and Philadelphia, Pa., starts at night from Rochester and arrives in Philadelphia the following day (211a-213a, 225a, 301a, 302a-306a). On the evening of January 5, 1942, Mushroom prepared a waybill covering the shipment and that night at eight o'clock shipped 19 of the 32 cartons to Philadelphia. Because of other shipments the trailer could not accommodate the entire shipment. The trailer which carried the 19 boxes was the only one scheduled for the Philadelphia run that night (227a, 228a, 238a-241a). The truck containing the 19 boxes moved on its regularly scheduled through-run to Philadelphia, stopping only at Williamsport for fifteen minutes to change drivers

and take on fuel, and arrived at the Philadelphia terminal of Mushroom the following day, January 6, 1942, at 1:30 p. m. (215a, 224a, 225a, 248a-250a, 252a, 266a, 267a).

The truck and trailer in which the remaining 13 boxes were shipped left Rochester at 8 p. m. on January 6, 1942, and moved on its regularly scheduled through-run to Philadelphia, stopping only at Williamsport for fifteen minutes for the purposes referred to above and arrived at the Philadelphia terminal of Mushroom the following day, January 7, 1942, at 11:30 a. m. (224a, 225a, 241a, 250a).

The trailers used in carrying these two shipments were Fruehauf trailers. Each consisted of a metal van 26′ long, which is closed on all sides and on the top. There is an air space of 4″ or 5″ between the metal exterior of the trailer and the laminated wood interior. At the rear of the van are two full length solid metal doors with veneer lining. These doors are the only means of access to the interior of the trailer. A tail gate closes over these rear doors and the doors completely seal the rear of the van. The doors were closed tight while the shipments were in transit and were closed tight upon arrival at Mushroom's terminal in Philadelphia (226a, 241a, 242a, 252a, 255a, 261a-264a).

When the two shipments arrived at the terminal of Mushroom in Philadelphia, the boxes were unloaded onto the platform in the terminal, which is located in the rear of the interior of the building and is built out from the rear brick wall. The platform is 125′ back from the doors of the terminal building. The boxes remained on that platform until called for by Bickley's Auto Express (182a-184a, 197a, 198a, 248a, 249a, 251a, 252a).

Immediately after the arrival of the first shipment on January 6, 1942, Mushroom notified Bickley of its arrival and a few hours later Bickley called with one of its trucks and loaded the shipment on it (180a, 183a, 186a, 248a-250a, 260a, 261a).

Immediately after the arrival of the second shipment on January 7, 1942, Mushroom notified Bickley of its arrival and a few hours later Bickley called with one of its

trucks and loaded the shipment on it (190a, 191a, 200a, 251a, 252a, 260a, 261a). On both occasions Bickley delivered to Mushroom a delivery receipt in which it acknowledged that the goods were "received in good condition" (196a, 197a, 199a, 200a, 251a, 252a, 260a, 261a, 293a).

The trucks used by Bickley had a panel body with a slatted gate at the rear, from which a tarpaulin operated on a rod (182a, 187a, 204a). Bickley took the two shipments to an unheated garage with doors on two sides in Jenkintown and kept them there over night (181a, 183a-187a, 190a, 191a, 200a-204a, 208a). On the morning following the respective arrivals of the shipments in Jenkintown, Bickley delivered them to Florex Gardens, the consignee, in North Wales, Montgomery County, Pa. (113a, 117a, 134a, 135a, 186a, 187a, 189a, 191a, 204a, 205a, 208a).

When the two shipments arrived at the Philadelphia terminal of Mushroom, and when they arrived at Florex Gardens in North Wales, there was no external evidence of freezing on the boxes (163a, 250a, 251a, 258a, 259a, 262a). There was testimony offered by petitioner in an effort to establish the frozen condition of a large part of the contents of the boxes upon arrival in North Wales.

Florex Gardens, the consignee, taking the position that the shipment was damaged by freezing, destroyed the bushes several weeks after they were delivered and refused to pay petitioner for them (126a). Petitioner thereafter instituted suit.

OPINIONS OF THE COURTS BELOW

The adjudication of the trial judge, in which he found in favor of both respondents, appears at pp. 310a to 329a of the record.

The per curiam opinion of the three judges of the Court of Common Pleas, sitting in banc, in which exceptions to the adjudication were dismissed, appears at pp. 332a to 339a of the record.

The unanimous opinion of the Supreme Court of Pennsylvania, affirming the judgment of the trial court, is reported in 351 Pa. 583 and appears at pp. 351a to 357a of the record.

QUESTIONS PRESENTED TO THE COURT BELOW

1. Did the respondent, Mushroom Transportation Company, meet its burden of proof under the circumstances?

(Affirmed by the Supreme Court of Pennsylvania.)

2. Was the loss alleged caused by the fault of the respondent, Mushroom Transportation Company?

(Negatived by the Supreme Court of Pennsylvania.)

3. Was the loss alleged caused by the inherent nature of the goods shipped and natural causes, the risks of which petitioner assumed?

(Affirmed by the Supreme Court of Pennsylvania.)

4. Was the respondent, Mushroom Transportation Company, the delivering carrier?

(Negatived by the Supreme Court of Pennsylvania.)

PETITIONER'S REASONS FOR THE ALLOWANCE OF A WRIT

The reasons assigned by petitioner for the allowance of a writ of certiorari appear at pp. 6 to 8 of the petition. In the light of the record, they create a wholly erroneous impression of the issues involved; they present the issues inadequately and inaccurately; and they disingenuously attribute to the highest court of the Commonwealth of Pennsylvania an abysmal ignorance of elementary principles of law relating to carriers. These reasons, read by one unfamiliar with the record, are so phrased as to create the impression that the ten Pennsylvania judges who considered this case (three in the trial court and seven in the Supreme Court), either through incompetence or defiance, rejected established legal principles applicable to the issues involved and "legislated a new exception into the Federal law", thus enabling petitioner to deplore the supposed departure from "national uniform principles", to characterize this case as a "grave matter" and to invoke a "lack of uniformity of decision" as a reason for a review by your Honorable Court.

In argument, we shall point out the reasons for the expression of these views, and the lack of merit in the petition.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

1. The burden of petitioner's argument is that the Pennsylvania courts failed to apply the federal rule as to burden of proof in this case. It is beyond contradiction that the Pennsylvania courts did apply the federal rule to the facts and correctly concluded that there was no basis for recovery.

2. Mushroom, as an intermediate, connecting carrier, cannot be held liable because there is no proof that the loss occurred on its lines.

3. Mushroom was not the delivering carrier within the meaning of the Interstate Commerce Act.

4. There was no negligence on the part of Mushroom.

5. Petitioner's loss was caused by the inherent nature of the goods shipped, and natural causes, the risks of which petitioner, as shipper, assumed.

6. The judgment of the Supreme Court of Pennsylvania follows, and is not in conflict with, applicable decisions of federal courts.

7. The case is not one of wide interest or public importance, but concerns only the parties themselves and their respective rights under an ordinary contract of carriage.

8. There is no substantial controversy between the parties of the character required to justify a review.

9. The questions raised by petitioner are frivolous, unsubstantial, and devoid of merit under the evidence in the case.

10. There was no denial to petitioner of any statutory privilege of federal origin.

11. There has been no adverse decision against petitioner respecting the federal rule as to burden of proof.

12. The case presented a pure question of fact which was resolved against the petitioner upon uncontradicted, credible evidence.

ERRATUM

The attention of the Court is directed to the fact that the word "not" should appear on the 24th line on page 328a of the record between the words "could" and "do". This was a stenographic error and the proper correction was made by the trial judge on the original typewritten adjudication after petitioner had printed the record for the Supreme Court of Pennsylvania.

ACTS OF CONGRESS

The Interstate Commerce Act, as amended, 49 USCA sec. 20, para. (11) provides that the *initial* carrier shall be liable for loss "caused by it or by any common carrier . . . over whose lines . . . said property may pass . . . when transported on a through bill of lading . . .".

The Act further provides that "any common carrier . . . *delivering* said property . . . shall be liable . . . for . . . loss . . . *caused by it* or by any such common carrier . . . over whose lines such property may pass . . . on a through bill of lading."

The Act further provides that "the *delivering* carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination."

Part II of the Interstate Commerce Act, relating to motor carriers, was adopted August 9, 1935 (49 USCA sec. 301 et seq.) and provided in Section 219 (49 USCA sec. 319) that "the provisions of sec. 20 (11) of this title shall apply with like force and effect to receipts or bills of lading of common carriers by motor vehicle." (Subsequent amendments of May 16, 1942, and August 7, 1942, had not been enacted when the alleged cause of action in this case arose.)

THE BILL OF LADING

The bill of lading in this case was prepared by petitioner and was issued by the initial carrier, Goetzman & Newman. It provides as follows (11a, 289a):

> "RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading at Newark, Wayne Co., New York, Jan. 5, 1942 From JACKSON & PERKINS COMPANY, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water lines, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on the back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns."
>
> . . . . . .
>
> "Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided. (b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. . . . Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the

property is stopped and held in transit upon the request of the shipper, owner, or party, entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes. . . .

Sec. 2 (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch."

THE TARIFFS FILED WITH THE INTERSTATE COMMERCE COMMISSION

Mushroom Transportation Company is engaged in the transportation of general commodities in interstate commerce as a motor carrier under the supervision, authority and control of the Interstate Commerce Commission, which on May 31, 1941, issued to it a Certificate of Public Convenience and Necessity, which certificate was in full force and effect at the time of the shipments involved in this case, by the terms of which Mushroom was authorized (303a).

> "to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier",

and also by the terms of which:

> "It is further ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:
>
> "Regular Routes:
>
> "General Commodities, except those of unusual value, and except dangerous explosives, household goods as defined in Practices of Motor Common Carriers of Household Goods, 17 M.C.C. 567, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading."

At the time of the issuance of the Bill of Lading by petitioner there had been published and filed with and approved by the Interstate Commerce Commission in accordance with its requirement, National Motor Freight Classification No. 5, which said Classification included the respondent, Mushroom Transportation Company, and contained a schedule of rates, fares, charges and tariffs in force at the time of and applicable to the shipment involved in the present case. The Classification contained no tariff applicable

to the respondent, Mushroom Transportation Company, which provided for the furnishing by it of artificial heat for the protection of perishable merchandise against freezing in the territory through which the shipment moved. The Classification specified in Rule No. 23 as follows (214a):

> "The obligation to accept articles for shipment shall be subject to capacity and appropriate type of vehicles, and to requirements of ordinances of law limiting or regulating the transportation of the property or use of the vehicles.
>
> "Ratings provided on freight requiring protection from heat or cold do not obligate the carrier to provide refrigeration, heater service or trucks specifically equipped for such protection, except as otherwise provided in carrier's tariffs."

SUMMARY OF ARGUMENT

(a) The federal rule as to burden of proof was followed and applied by the courts below; the burden was placed on the respondents and sustained by their proof.

(b) There being no evidence of loss on the lines of Mushroom, petitioner cannot recover against it.

(c) Mushroom proved that it was not negligent.

(d) Petitioner's theory of recovery is erroneous.

(e) Mushroom's tariffs prohibited the furnishing of artificial heat.

(f) Mushroom was not the delivering carrier.

ARGUMENT

I. THE BURDEN OF PROOF

In its brief petitioner labors the proposition that the federal law as to burden of proof controls. Respondents have at no time asserted the contrary. They readily acknowledged during the trial that the federal law applied (171a-176a). The trial judge in his adjudication expressly held that "the federal law controls" (314a-316a). The trial court, sitting in banc, held that the trial judge "placed upon the defendants and the defendants assumed and sustained the burden of proof that they used due care in handling the shipments" (337a) and that "*both defendants met the burden of proof cast upon them . . .*" (338a; italics of the court in banc). The trial court in banc also held that no burden was placed upon petitioner by the trial judge to show temperatures at points through which the shipments moved and pointed out that petitioner as part of its own case proved that the plants froze and introduced testimony as to temperatures. It then observed that there was no evidence from which exposure of the plants by the carriers could be found or inferred and said: "There was no factual evidence by anyone to substantiate the plaintiff's theory, which, at best, was only a guess" (335a). The trial court in banc then concluded its opinion by confirming the conclusion of the trial judge that "the loss in this case was not caused by the failure of defendants to properly perform their duties as common carriers by motor vehicle under the law applicable under the circumstances, or their contract with the plaintiff as evidenced by the bill of lading and the carriers' tariffs on file with the Interstate Commerce Commission, and was not caused by any negligent act or fault on the part of the defendants, but was caused by the inherent nature of the goods shipped, and natural causes, the risks of which the plaintiff, as shipper assumed" (339a).

Thus, petitioner by its own proof brought its case within two exceptions to an interstate motor carrier's liability, i. e., an act of the shipper and the inherent nature of the goods.

The Supreme Court of Pennsylvania (351 Pa. at 585; R. p. 351a) said:

> "The plants were frozen and of no value when delivered to the consignee, facts making a prima facie case against the defendants. The defendants are liable unless the record shows they discharged their obligation to transport and deliver."

And at 351 Pa. at 591; R. p. 357a:

> "The evidence supports the conclusion that the damage resulted from the shipment of property liable to freeze during the low temperatures stated above, in unheated transportation facilities and that defendants performed their contract of carriage without negligence."

Thus, it is apparent in the record that the burden on Mushroom was met by proof that the injury resulted from excepted causes, i. e., the act of the shipper and the inherent nature of the goods, and that Mushroom omitted no duty of care in transporting the goods.

The vice of petitioner's contention, as will more fully appear later in this brief, lies in its *assumption* that it was *impossible* for the plants to have frozen except as the result of negligent exposure. Petitioner does not really mean that the Pennsylvania courts failed to apply the federal rule as to burden of proof. Its *real* complaint is that the trial judge did not find as a fact that the bushes could not have frozen except for negligent exposure. This was a matter for the trial judge as a trier of fact and his refusal to find the facts necessary for the support of petitioner's theory was within his exclusive province and is conclusive.

There was no failure on the part of Mushroom to establish that the injury was from an excepted case, as suggested by petitioner. The evidence abundantly demonstrated that the cause of the loss was freezing.

There is no legal rule which requires a carrier by its own proof to establish that the loss was caused by an excepted peril. It is enough if the facts appear in the case. If, for example, a shipper should prove as a part of his case the fact that his shipment was destroyed while in the possession of the carrier by saboteur agents of a foreign government with which this country was at war, could it be contended that the shipper could recover simply because the carrier did not prove the sabotage? Since petitioner proved that the loss resulted from freezing, the carrier has met its burden by adducing evidence to support the finding of the trial judge of due care on its part in transporting the goods.

The Supreme Court of Pennsylvania did not hold or even intimate that freedom from negligence is an exception within which a carrier may bring itself to avoid liability, as suggested by petitioner. The trial judge and the Supreme Court of Pennsylvania held, consistently with a long line of cases, that the law as applied to the facts in this case imposes no duty on the carrier to "insure against the effect of this natural law" (351 Pa. at 591; R. p. 357a); that the "Defendants were not insurers against loss resulting from the inherent nature of the plants" (351 Pa. at 585; R. p. 351a); that "the transportation in unheated vehicles during the low temperature prevailing and to be expected at that time of the year was an error of judgment on the part of the shipper" (351 Pa. at 590; R. p. 355a); that "This moisture constituted an inherent infirmity during freezing weather exactly as the moisture in fruit and vegetables constituted an infirmity during freezing weather, or during excessive heat" (351 Pa. at 591; R. p. 357a).

The Supreme Court of Pennsylvania approved the finding of the trial judge that if the bushes froze the result was due to:

> ". . . The inherent nature of the goods shipped, and natural causes, the risks of which the plaintiff, as shipper, assumed" (351 Pa. at 585; R. p. 351a).

In *Schnell v. The Vallescura*, 293 U. S. 296, on which petitioner relies, it is held:

> "Where the state of the proof is such as to show that the damage is due either to an excepted peril or to the carrier's negligent care of the cargo, it is for him to bring himself within the exception or to show that he has not been negligent."

Therefore, when the Supreme Court of Pennsylvania referred to and approved the finding of the trial judge that Mushroom "omitted no duty of care", it followed the rule announced in the Schnell case and affirmed the judgment because the evidence showed that the loss resulted from an excepted peril. Obviously, the court was not attempting to make the absence of negligence an additional exception to a carrier's liability. The court in referring to the question of negligence had the federal rule of liability firmly in mind and found that the trial judge was right in finding that the "defendants had kept the shipments 'from extreme heat or cold' ", and that the damage "was not caused by any negligent act or fault on the part of the defendants."

The plaintiff's theory of recovery will be considered more closely under Part IV of this brief.

II. THERE BEING NO EVIDENCE OF LOSS ON THE LINES OF MUSHROOM TRANSPORTATION COMPANY, PETITIONER CANNOT RECOVER AGAINST IT.

The proposition is firmly settled in the law of carriers that a shipper cannot recover as at common law from an intermediate carrier in interstate commerce unless the shipper affirmatively proves that the loss occurred on that carrier's lines.

In *Oregon-Washington Co. v. McGinn*, 258 U. S. 409, this Court said:

> "The settled federal rule is that, in the absence of statute or special contract, each *connecting carrier* on a

through route is bound only to safely carry over its own line and safely deliver to the next connecting carrier, Myrick v. Michigan Central R. R. Co., 107 U. S. 102, 107; Railroad Co. v. Manufacturing Co., 16 Wall. 318, 324, and the liability of a connecting carrier for the safety of property delivered to it for transportation, commences when it is received and is discharged by its delivery to and acceptance by a succeeding carrier, or its authorized agent. Pratt v. Railway Co., 95 U. S. 43." (Italics supplied.)

To like effect see *Dietz v. Southern Pacific Railway Co. et al.*, 225 Mo. App. 39; *New York & Baltimore Transportation Lines v. Southern Pacific Co.*, 118 Md. 73; *Farmers Nursery Company v. Cowan, Receiver of B. & O. R. R. Co.*, 21 Pa. Superior Ct. 192; *Barron Bros. v. New York & R. Co.*, 31 Ga. App. 757, 172 S. E. 83.

It has been shown that Goetzman & Newman was the initial carrier; that Mushroom was the connecting or intermediate carrier and that Bickley was the terminal or delivering carrier. In order for petitioner to recover from Mushroom, it was incumbent upon it to prove that the alleged loss occurred while the shipment was in the possession of Mushroom in transit upon its lines. There was no evidence whatever to establish where the alleged loss occurred during its transportation from Newark, N. Y., to North Wales, Pa., and it will not be contended by petitioner that there is any evidence from which any conclusion on that point can be made. Petitioner has therefore failed to sustain the burden which the law imposes upon it and it cannot recover against Mushroom.

There is a presumption of negligence on the part of Bickley, the delivering carrier. That principle is announced in many cases and reference to *Dietz v. Southern Pacific Railway Co. et al.*, supra, will be illustrative. The Court there said:

"Furthermore, the provisions of the Carmack Amendment have in nowise abrogated or changed the usual presumption, that goods shown to have been delivered in good condition to the initial carrier remained

in that condition to the time of their delivery to the last or delivering carrier, and that the injury or loss occurred while the goods were in the last carrier's possession. Chicago & N. W. Ry. Co. v. C. C. Whitnack Produce Co., 258 U. S. 369, 42 S. Ct. 328, 66 L. Ed. 665; State ex rel. v. Taylor, 298 Mo. 474, 251 S. W. 383; Johnson v. Missouri Pac. R. Co., supra; Durnford v. Chicago, B. & Q. R. Co., supra."

See also *Cassone v. N. Y., N. H. & H. R. R. Co.*, 100 Conn. 262; *Lewis v. Joyner*, 113 S. E. 829. (See many other cases to like effect appearing in the annotations at page 220 of 49 USCA Sec. 20 (11).)

This contention was urged on behalf of Mushroom in the trial court and on appeal in the Supreme Court of Pennsylvania. The case was decided favorably to Mushroom on different grounds, however, and it was therefore unnecessary for the Pennsylvania courts to refer to the principle just discussed.

The significant fact is, however, that the petitioner has made no attempt at any time during this litigation to contradict the rule of law to which reference is herein made, or to distinguish the facts of this case from those in the several decisions in which the rule has been applied.

We submit that the rule is a conclusive bar to recovery against Mushroom.

III. THERE WAS NO NEGLIGENCE ON THE PART OF MUSHROOM TRANSPORTATION COMPANY.

The proof fully sustained the finding of the trial judge that Mushroom was free from negligence.

Without previous notification, the initial carrier, Goetzman & Newman, delivered the shipment at the terminal of Mushroom in Rochester in the forenoon of January 5, 1942, and unloaded it upon a protected platform in the interior of Mushroom's terminal. In the early evening

of the same day Mushroom loaded nineteen of the thirty-two cartons comprising the shipment onto a truck which went forward to Philadelphia and arrived the following day on schedule time. The remaining thirteen cartons could not be loaded on January 5th because other merchandise filled the truck. These thirteen cartons were shipped the following evening, January 6th, and arrived in Philadelphia the following day on schedule time.

Both shipments were carried in modern, well-equipped Freuhauf trailers, which have been described above. The doors were closed while the shipments were in transit and were closed upon arrival of the shipments in Philadelphia.

Immediately upon arrival of the shipments in Philadelphia, they were unloaded upon a protected platform in the interior of Mushroom's Philadelphia terminal. Bickley was immediately notified of the arrival and subsequently called for the boxes and later delivered them to the consignee at North Wales (293a, 295a).

Bickley's trucks, unlike those of Mushroom, were not completely sealed at the rear. Bickley's trucks had a panel body with a slatted gate at the rear, from which a tarpaulin operated on a rod. Each shipment after it was called for at Mushroom's terminal by Bickley was taken by the latter to his garage in Jenkintown and kept there over night. This garage was unheated and had two doors. The shipments were delivered at North Wales on the morning of the following day. As to the second shipment, which was delivered on January 8th, there was testimony by witnesses connected with Florex Gardens, the consignee, that the rear of Bickley's truck was open and unprotected.

Petitioner refers to the testimony of William J. Bickley, son of the defendant Bickley, relating to a "slight skim of ice" on the paper of the boxes comprising the first shipment. His testimony was challenged in the court below on the ground that it was not worthy of belief. Mushroom's platform manager at its Philadelphia terminal denied that

there was any external evidence of freezing. Credible witnesses connected with the consignee, who testified for the plaintiff, expressly stated that there was no external evidence of freezing on the boxes. In view of the hostile, evasive and inaccurate testimony of William J. Bickley, his testimony in that respect was without weight and was not accepted by the trial judge (327a). Even if it be assumed that the first shipment bore external evidence of freezing, it did not establish that there was internal freezing when Bickley received the goods. When the alleged freezing occurred or under what circumstances would be left entirely to speculation. The court could not guess or impose inference on inference. Moreover, under the authorities, mere freezing is not a sufficient basis upon which to ground recovery. The loss must have been "caused" by the negligence of Mushroom, which not only does not appear in the record but was clearly disproved by its uncontradicted evidence.

It is difficult to imagine how a carrier could more clearly show freedom from negligence than Mushroom has in this case. It proved without contradiction the prompt and expeditious shipment of the merchandise to Philadelphia. Its recital of the circumstances surrounding the shipment was utterly free of any suggestion of irregularity. Its witnesses traced the shipment from the moment it was received at Rochester until it was delivered to the terminal carrier, Bickley, in Philadelphia. It was shown without denial that the shipments were received and unloaded in a protected terminal in Rochester and there sheltered until they were loaded on modern, well-constructed and well-insulated trailers. The trailers proceeded on their regularly scheduled runs without mishap or interruption en route and arrived in Philadelphia on schedule time. No deliveries were made en route at intermediate points. The rear doors of the trailers remained closed and sealed throughout the transportation. As soon as they arrived they were unloaded in a protected terminal in Philadelphia and the delivering carrier, Bickley, was immediately notified.

The trial judge found that the loss "was not caused by any negligent act or fault on the part of the defendants" (329a). From this finding which is supported by undisputed, credible evidence, it follows that if the bushes froze the result was due to "the inherent nature of the goods shipped, and natural causes, the risks of which the plaintiff, as shipper, assumed" (329a).

The trial judge expressly found that "the evidence of the defendants shows that they took all the reasonable precautions that they were required to take in regard to this shipment. They provided suitable transportation and exercised the degree of care which the nature of the shipment required" (322a, 324a-328a).

The trial court further found: "We feel that we are bound to find from the evidence adduced by the defendant, Bickley, that it has sustained the burden cast upon it as a delivering carrier of showing that it was not guilty of negligence which was the proximate cause of the loss in this case. The same must be said with respect to the evidence adduced by the defendant, Mushroom Transportation Company, . . ." (328a, 329a).

The trial court further concluded that "the loss in this case was not caused by the failure of defendants to properly perform their duties as common carriers by motor vehicle under the law applicable under the circumstances, or their contract with the plaintiff as evidenced by the Bill of Lading and the carriers' tariffs on file with the Interstate Commerce Commission, and was not caused by any negligent act or fault on the part of the defendants, . . ." (329a).

The Supreme Court of Pennsylvania (351 Pa. at 589; R. p. 355a) said:

> "The evidence supports the fact, implicit in the conclusion of the learned judge, that defendants omitted nothing, provided for by their tariffs, that would prevent subjecting the plants 'to extreme heat or cold,' while in transit or at rest."

IV. PETITIONER'S THEORY OF RECOVERY IS ERRONEOUS

Petitioner's statement of claim in paragraphs 22, 23 and 27 (7a, 8a) affirmatively pleaded negligence on the part of both defendants "in not protecting the said goods from cold and their negligent detention and delay in the transportation of the said goods." Petitioner failed to prove negligence and there was no evidence or detention or delay (351 Pa. at 590; R. p. 356a).

On appeal to the Supreme Court of Pennsylvania petitioner therefore adopted a new theory. In doing so, it fell into the error of assuming as true everything its witnesses said, forgetting the rule that requires the evidence to be viewed in a light most favorable to the respondents in view of the trial court's finding, and overlooking the principle that the court, as stated by the trial judge during the trial, does "not have to take the opinion of any expert" (276a) and, as stated by the Supreme Court of Pennsylvania (351 Pa. at 590; R. p. 356a): "The value of the opinion evidence was, of course, for the trier of facts: compare Ray v. Philadelphia, 344 Pa. 439, 25 A. 2d 145; Com. v. Shults, 221 Pa. 466, 70 A. 823."

The difficulty with petitioner's position is its persistence in advancing the erroneous contention that the trial judge had to accept everything its so-called experts said merely because their testimony was not contradicted. Petitioner relies on the trial judge's *reference* to the testimony of petitioner's witness, Finewood, to the effect that rosebushes, packed as petitioner packed them, would withstand a temperature of zero and possibly a little below if they are properly handled in transit (312a). Finewood first testified "Sure" in answer to a question by the trial judge whether the bushes would withstand that temperature "for a certain period" (78a). Under cross examination the witness testified in answer to a similar question: "A few hours possibly", and later "Maybe a couple of hours." Finally he testified as follows (100a):

"Q. Will you give us, or are you able to give us, Mr. Finewood, a positive statement of your opinion on that. You say a few hours, and you say maybe two hours; I would like for you, if you can say so, based upon the experience and work that you have testified to, how long this shipment as it was packed would withstand a temperature of zero, how many hours?

A. I don't know.

Q. You don't know?

A. No."

Petitioner also relied on the opinion of one of its *own* witnesses that the shipment "must have been directly exposed" (276a), but in answer to a question as to how much exposure was necessary to produce the condition in which the bushes were claimed to have been found, the witness acknowledged "that is rather difficult to answer," and then said: "I believe five or six hours, or possibly seven hours of exposure", followed by a reference to certain other qualifying factors which might affect his opinion, and without any attempt by the witness to testify with respect to the physical conditions which would have to prevail during the five to seven hour exposure to produce the result complained of (278a).

The trial judge referred to the testimony of the plaintiff's witnesses merely *in narrative form* in discussing the "evidence" which was "produced" by petitioner (320a). The trial judge merely observed that petitioner's witnesses *testified* that exposure "might" have caused the alleged damage (328a). *He nowhere found such to be the fact.* He did not accept the testimony "as true" and conclusive, as erroneously and persistently suggested by petitioner, nor did the trial judge find or conclude that the goods were exposed by the defendants "for a considerable period" as stated in the petition (pp. 27, 28). The exact contrary is true, as fully appears in the adjudication and the opinion of the trial court in banc.

Upon the basis of such testimony, which the court was not bound to credit and which, in any case, is far from conclusive, petitioner bases an argument which, as we understand it, is:

(a) The bushes were so packed as to withstand a temperature of zero.

(b) The bushes would not withstand a temperature of zero if exposed for five to seven hours.

(c) Since the bushes were frozen and the defendants did not prove that the temperature went to zero it must be concluded that there was negligent exposure.

Apart from the fact that the factual premise of this argument is based upon an untenable construction of the evidence, the conclusion which petitioner attempts to draw from it is not sound. Petitioner pleaded in its statement of claim and offered in evidence at the trial labels claimed to have been affixed to the cartons which emphasized that the plants were "highly perishable" and "easily frozen." This acknowledgment of perishability is in the teeth of the testimony of petitioner's witnesses. It is conclusive evidence that petitioner was fully aware of the danger of shipping these goods in the dead of winter, and demonstrates that the trial court in banc was right in stating that "it has become common knowledge that they [rosebushes] do freeze and are killed by freezing." (334a).

The Supreme Court of Pennsylvania (351 Pa. at 591; R. pp. 356a, 357a) said: "It is common knowledge that moisture subjected to low enough temperature will freeze, whether it be the moisture in moss around such roots or moisture in fruit and vegetables."

Moreover, assuming that petitioner's witness was right in stating that the bushes would have withstood zero for five to seven hours, *it is plain that the bushes would have frozen after longer periods of higher subfreezing temperatures.*

Petitioner contends that the respondents, in order to escape liability, were obliged to prove that there existed temperatures so low that the goods froze even though not exposed, and that the respondents were required to show that the temperature had been below zero. Such reasoning is imperfect.

Petitioner proved that the temperature in Newark, N. Y. on the date of the shipment was fifteen degrees above zero (106a). By stipulation filed (309a) it appears that the average mean temperature prevailing in Philadelphia on January 6, 1942, when the first shipment arrived, was fifteen degrees; that on January 7th, when the second shipment arrived and the first one was delivered in North Wales, it was eighteen degrees, and that on January 8th, when Bickley delivered the second shipment in North Wales, it was eleven degrees.

How, in this state of the record, can petitioner argue with reason that it was "conjecture" by the trial judge that the temperature was low enough to freeze the goods?

Petitioner argues that the respondents should have proved that the temperature dropped low enough to freeze the bushes, notwithstanding the fact that petitioner in its case proved subfreezing temperatures, and notwithstanding petitioner's admission in its petition (p. 31) that "Official Weather Bureaus are maintained by the United States Government at only two points along the route of shipment of the rosebushes—one at the initial point of Rochester, and the other in Philadelphia, near the ultimate delivery point of the goods."

Realizing the impossibility of proving a fact which it contends it was the respondents' burden to prove, petitioner suggests that respondents' trucks should have been equipped with thermometers from which the drivers could have made readings every mile or so en route. No such burden has ever been placed on any carrier by any court, and petitioner cites no authority to sustain any such novel and impracticable proposition.

Petitioner's argument ignores realities and assumes, incorrectly, that the plants could have frozen in only two situations; i. e., first, if the temperature dropped below zero and second, if the defendants negligently exposed the goods. As stated, the argument overlooks the actuality that the plants could freeze without negligent exposure if subjected to a freezing temperature for a longer period than five to

seven hours. This is precisely what happened and the court below so found.

If, in addition to requiring proof by carriers of due care, the law should require in a case of this kind proof of temperature at every point along the entire course of an interstate shipment of goods, no carrier could defend because of the practical impossibility of meeting such a burden, and every carrier would be an insurer against freezing, without regard to negligence and its published tariffs. Petitioner's theory is without support in reason or in law.

When petitioner contends that the carriers failed to meet their "burden of proof" it *means* that the carriers failed to prove that the temperature went to zero. That is the sum and substance of petitioner's argument on burden of proof. It is patently without merit. Petitioner contends that the carrier must by its own proof show that the damage was due to an excepted cause and that because the carrier offered no evidence as to what caused the freezing, it did not meet its burden of proof. Petitioner misconceives the meaning of "burden of proof." The burden of proof is the duty of going forward with evidence. If petitioner in its own case shows the cause of the loss, as it did here, there is no occasion for independent proof of the same facts by the carrier. Petitioner in its own case proved subfreezing temperatures, and offered evidence to prove that the bushes were frozen on arrival. In arguing that the carriers did not show what caused the freezing, petitioner is completely unrealistic. As the Supreme Court of Pennsylvania said (351 Pa. at 585; R. p. 352a):

> "We need not discuss plaintiff's argument on the burden of proof; the evidence is in the record; the only question now is whether the law was correctly applied to the evidence. If, on the evidence, a jury could not find for the defendants, the judgment must be set aside."

Schnell v. Vallescura, 293 U. S. 296, upon which petitioner relies, is not parallel to the instant case. In that case the action was to recover damages against a vessel due to decay in a shipment of onions. The trial judge found that

the carrier was guilty of "negligence in failing to provide proper ventilation." Petitioner relies upon the case as authority for the proposition that the burden rests upon the carrier to bring itself within any exception relieving it from liability.

In the case at bar it was found by the trial judge that petitioner's loss "was caused by the inherent nature of the goods shipped and natural causes, the risks of which the plaintiff, as shipper, assumed" (329a). It is therefore apparent that the alleged loss comes within exceptions noted in the bill of lading.

In the Vallescura case this Court said:

> "It is commonly said that when the carrier succeeds in establishing that the injury is from an excepted cause, the burden is then on the shipper to show that that cause would not have produced the injury but for the carrier's negligence in failing to guard against it."

No such evidence was produced in the instant case.

This Court further pointed out in the Vallescura case that if the carrier fails to show that the damage is from an excepted cause, the burden is upon him to show that the damage was not due to failure properly to stow or care for the cargo during shipment. The Court said:

> "Where the state of the proof is such as to show that the damage is due either to an excepted peril or to the carrier's negligent care of the cargo, it is for him to bring himself within the exception or show that he has not been negligent."

The record shows that the loss occurred as a result of excepted perils and that the carriers were not negligent. This meets the test laid down in the Vallescura case.

V. MUSHROOM WAS NOT REQUIRED TO HEAT ITS TRUCKS

There was no obligation on the part of Mushroom to furnish heat in its trailers or garage to protect goods from

freezing. It had no authority to do so and if it had offered such service, it would have violated its Certificate of Public Convenience and Necessity issued by the I. C. C. The evidence conclusively established without contradiction that the classification containing Mushroom's schedule of rates, in force at the time the shipment in question was made, contained no tariff applicable to Mushroom which provided for the furnishing by it of heat for the protection of perishable merchandise against freezing in the territory through which it moved. The mere fact that the shipment, or part of it, froze, does not establish liability on the part of Mushroom, the connecting carrier, or on the part of the initial or delivering carriers.

A case strikingly similar to the case at bar, which we submit is controlling, is *W. H. Blodget Co. v. N. Y. Central R. R. Co.*, 261 Mass. 365, 159 N. E. 45 (1927). In that case a consignee of an interstate shipment of celery brought an action to recover damages arising from its injury by freezing while in transit between Rochester, New York, and Worcester, Mass. The bill of lading in that case was identical in form to the bill of lading in the instant case. The defendant in that case acknowledged receipt of the merchandise under a bill of lading which read, as in the case at bar, "subject to the classifications and tariffs in effect on the date of the issue of this Original Bill of Lading". In that case, as in this, the classification containing the carrier's schedule of rates, fares and charges in force at the time the shipment was made and applicable thereto, contained no tariff applicable to the defendant or to any other railroad company which provided for the furnishing by the carrier of heat for the protection of perishable merchandise against freezing in the territory over which the shipment moved or in the Eastern states generally. The Court in its opinion recited the provisions of the bill of lading, which contained precisely the same language as the bill of lading in the instant case, and in entering judgment for the carrier said in part as follows:

"The first question is whether the defendant is liable at common law for the injury arising while the celery was in transit. A common carrier generally is practically an insurer of goods in its possession. This rule, however, is subject to certain well recognized exceptions. A carrier is not liable for loss or damage arising from an act of God, from the public enemy, nor for the destruction of goods or injury due to their inherent nature, if the negligence of the carrier did not occasion or contribute to the injury. It has been held that where perishable goods such as fruit and vegetables are injured or destroyed in transit, the carrier is not liable if its own negligence did not cause the injury. It was said in Swetland v. Boston & Albany Railroad, 102 Mass. 276, at page 283: 'If the owner of goods, which are liable to be injured by freezing, chooses to send them at a season of the year when they are exposed to such risks, he takes the risk himself.' A carrier, in the absence of an agreement to do so, is not bound to heat cars to protect perishable goods from freezing. McGovern v. Ann Arbor Railroad, 165 Wis. 525; McGraw v. Baltimore & Ohio Railroad, 18 W. Va. 361; Cassone v. New York, New Haven & Hartford Railroad, 100 Conn. 262; Ross v. Maine Central Railroad, 112 Maine 63; Schwartz & Co. v. Erie Railroad, 128 Ky. 22; Vail v. Pacific Railroad, 63 Mo. 230; Standard Pickle Co. v. Pere Marquette Railway, 222 Mich. 639; White v. Minneapolis & Rainy River Railway, 111 Minn. 167; Atlantic Fruit Co. v. Pennsylvania Railroad, 149 Md. 1; Leypoldt & Pennington Co. v. Davis, 112 Neb. 350.

"In the case at bar the goods were shipped about the middle of December, a time in this climate when freezing weather is not unusual, but might reasonably be expected. There is nothing in this record to show that the cause of injury to the shipment was so unexpected, unusual, or extraordinary as to be said to have arisen from an act of God. Such weather is an event which, according to common experience, naturally might be expected. The case can not be distinguished in principle from Swetland v. Boston & Albany Railroad, supra, and is governed by it.

"It is manifest that at common law the defendant can not be charged with liability merely because heat was

not furnished to protect the celery. . . . This was a shipment in interstate commerce and was received for transportation subject to such classification and tariffs. Thereunder the carrier was not required to furnish heat, but the shipper might do so. The rates were published under the requirements of the interstate commerce act and are binding upon all parties engaged in interstate transportation. The shipment was made under the standard bill of lading issued by the defendant in conformity with the Cummins amendment to the interstate commerce act. U. S. St. 1915, c. 176; 38 U. S. Sts. at Large, 1196. The rights and liabilities of the parties are governed by the Act of Congress, the bill of lading, and the tariffs duly filed with the interstate commerce commission. . . . The shipper and consignee knew or were charged with knowledge of these provisions. . . .

"Not only was the defendant under no obligation to heat the car to protect the celery from freezing, but, under the provisions of the classifications and tariffs, it had no legal right to do so. . . ."

See also *Clemons Produce Co. v. Denver & Rio Grande R. R. Co.*, 203 Mo. App. 100, 219 S. W. 660; *McGovern v. Ann Arbor R. R. Co.*, 165 Wis. 525, 162 N. W. 668.

VI. THE PLAINTIFF ASSUMED THE RISK OF FREEZING TEMPERATURES

The shipment was delivered by petitioner on January 5, 1942, in northern New York state. Clearly, freezing temperatures could readily have been anticipated at that time of the year. Yet petitioner shipped these boxes, containing a large quantity of moisture, in the same cartons in which they had been received from California, where there is a temperate climate, without changing the wrapping or protecting the bushes, except to add a sheet of wrapping paper on the outside. Moreover, there was no previous notice given to Mushroom of petitioner's intention to ship the goods. The first knowledge acquired by Mushroom was

when it found the boxes on its protected loading platform in the interior of its terminal in Rochester. As shown by the cases cited elsewhere in this brief, petitioner was bound under the law to know the limitations and restrictions imposed upon Mushroom by its Certificate of Public Convenience and Necessity and its published tariffs.

The complete shift in petitioner's position with respect to the perishability of these bushes should be noted. In paragraph 16 of the statement of claim (6a) petitioner alleged that the goods involved were "perishable". In paragraph 18 (7a) it alleged that labels were attached to the cartons, "which bore instructions that the contents were perishable, easily frozen, and must be kept from extreme heat or cold", and at the trial the labels were offered in evidence and the perishability of the bushes was stressed by petitioner. Yet, in petitioner's brief the position is taken (pp. 33, 34) that the goods shipped in the instant case were not perishable; and an attempt is made to explain away the "perishable" quality of the goods which it had taken such pains to plead and prove, by stating merely that petitioner meant that the goods were "susceptible to injury". This contention is so transparent that if any answer at all is required it is found in the following language in the opinion of the court in banc (334a):

> "Rosebushes have been so universally grown in all countries in the temperate zones for so many hundreds of years that it has become common knowledge that they do freeze and are killed by freezing".

The Supreme Court of Pennsylvania (351 Pa. at 591, R. p. 356a) said: "We must reject appellant's argument that this was not a perishable shipment, though so described by it."

It is not material to the question of the respondents' liability that the cartons bore labels on which the word "perishable" appeared. ". . . the bill of lading issued by the initial carrier in an interstate shipment governs the entire transportation and fixes the obligations of all par-

ticipating carriers to the extent of its valid terms. . . .": *Cassone v. N. Y., N. H. & H. R. Co.*, 100 Conn. 262, 270.

"The rights and liabilities of the parties are governed by the Acts of Congress, the bill of lading, and the tariffs duly filed with the interstate commerce commission. . . . The shipper and consignee knew or were charged with knowledge of these provisions. . . . Not only was the defendant under no obligation to heat the car to protect the celery from freezing, but, under the provisions of the classifications and tariffs, it had no legal right to do so": *W. H. Blodget Co. v. New York Central R. R. Co.*, 261 Mass. 365. Petitioner could not by the mere device of sticking labels on the boxes impose upon Mushroom an obligation which, under the law, it had no duty to assume or right to perform.

There is no evidence that Mushroom failed in any way to comply with the terms of the labels, although, as we have pointed out, it was under no obligation to do so. Prompt and careful transportation of the merchandise by Mushroom in modern, well-equipped trucks was fully established by the testimony. It fully complied with its duty as a carrier under the law. Mushroom was not obligated to furnish heat. The rule is announced in *Pacific Fruit & Produce Co. v. Northern Pacific Ry. Co.*, 186 Pac. 852: "A carrier in interstate commerce can enter into no contract of transportation for which there is no express authority in its filed and published tariffs. T. & P. R. Co. v. American Tie Co., 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255."

Petitioner well knew the character of the rosebushes which comprised the shipment. But on the bill of lading which constitutes the contract the goods were described merely as "boxes dormant trees". Such a description is completely misleading and inaccurate. Knowing of the limitations imposed by law on Mushroom, petitioner cannot now seek to impose upon the carrier a heavier burden or a higher duty than the law requires.

In *Clemons Produce Co. v. Denver & Rio Grande R. R. Co.*, 203 Mo. App. 100, 219 S. W. 660, the court held that

the freezing was an act of God, for which the carrier would not be answerable and stated that even if the freezing were not regarded as an act of God, "if the loss occurs through the perishable character of the freight, unmingled with the carrier's negligence, it is not his act and he should not be held liable, though the burden would be on him to show that fact."

In *B. F. Schwartz v. Erie R. R. Co.*, 128 Ky. 22, 106 S. W. 1188, the Court said:

> "Where the injury to goods is due to their own inherent nature and from natural causes, such as freezing, without fault on the part of the carrier, he is not responsible. . . . The carrier is also not responsible for any injury which is due to the negligence of the shipper."

It was there held that the railroad company was not responsible for a shipment of apples which froze in transit.

In *White v. Minneapolis & Rainy River Ry. Co.*, 111 Minn. 167, 126 N. W. 533, it was held that a carrier does not insure perishable freight against freezing during the period ordinarily required for its transportation in the absence of a contract to that effect and that there could be no recovery for damage to vegetables frozen in transit unless the defendant failed to use reasonable care to protect the shipment while its shipment was delayed.

See also *McGovern v. Ann Arbor R. R. Co.*, 165 Wis. 525, 162 N. W. 668.

In *McGraw v. B. & O. R. R. Co.*, 18 W. Va. 361, the action was to recover the value of potatoes which were frozen in transit. The plaintiff recovered on the theory of delay in shipment but it was held that (p. 365): "if the question of liability rested simply upon the question, whether they were liable for the freezing of the property, having been guilty of no negligence or misconduct by which that injury resulted, I would have as little hesitation in saying, that they were not liable; on account of the nature and inherent character of the property and its liability to freeze."

The same rule was applied in *Vail v. Pacific R. R.*, 63 Mo. 230.

"As a general rule, a carrier as to most commodities delivered to it for transportation is an insurer against all results incident to the transportation, except injury resulting from the act of God, the public enemy, the fault of the shipper, but it is only liable for deterioration in perishable goods in case of negligence": *Tri-State Fruit Growers' Assn. v. St. Louis-San Francisco Ry. Co.*, (Mo. App.) 264 S. W. 445.

Petitioner draws a rather tenuous distinction between vegetables and fruit on the one hand and dormant rosebushes on the other, and argues that the cases holding that a carrier is not liable for the freezing of vegetables and fruits are not applicable to carriers of dormant rosebushes. We fail to perceive any reality in the distinction drawn. Fruits and vegetables can freeze. So can dormant rosebushes. Wherein lies any distinction insofar as freezing is concerned? The fallacy in petitioner's argument is in failing to distinguish between the rot and decay of vegetable and animal matter, which is an inherent vice in such goods, and the susceptibility of all vegetable matter to freezing. The incontestable fact remains that dormant rosebushes just as potatoes or apples, are susceptible to freezing. Petitioner knew this and should have taken such precaution to protect its goods adequately against freezing, either by shipping in heated railroad cars or affording proper wrapping to safeguard the contents of the boxes against the cold weather which then existed.

As stated by the Supreme Court of Pennsylvania (351 Pa. at 585, R. p. 351a): "Defendants were not insurers against loss resulting from the inherent nature of the plants".

VII. MUSHROOM WAS NOT THE DELIVERING CARRIER

The Interstate Commerce Act, 49 U. S. C. A. Sec. 20, paragraph (11) as embodied in the Federal Motor Carriers

Act of 1935, 49 U. S. C. A. Sec. 319, provides that "any common carrier . . . *delivering* said property . . . shall be liable . . . for . . . loss . . . caused by it or by any such common carrier . . . over whose lines such property may pass . . . on a through bill of lading."

This suit was brought against the defendant carriers under that section of the Act "since . . . one of the defendants is liable as delivering carrier under Section 219 of the Federal Motor Carriers Act . . .". (See conclusion of statement of claim, p. 9a.)

The evidence overwhelmingly establishes that Bickley, not Mushroom, was the delivering carrier. All the proof, both oral testimony and documentary evidence, points unerringly to the fact that Bickley was in fact and in law the delivering carrier, and is utterly inconsistent with any theory that Mushroom was the delivering carrier.

The trial judge expressly concluded that Bickley was the delivering carrier. In his adjudication he wrote (328a): "In our judgment the delivering carrier in this case was William Bickley, trading as Bickley's Auto Express. He performed the line-haul service nearest to the point of destination." He also referred to Bickley "as a delivering carrier" (329a). The Court in banc stated that Mushroom "was *not* the delivering carrier, . . ." (337a, Court's italics). Neither petitioner nor Bickley filed exceptions to these findings and conclusions.

The Supreme Court of Pennsylvania (351 Pa. at 588, R. p. 354a) said:

> "The learned judge was therefore right in holding that Bickley's Auto Express was not performing a mere switching service but was participating in the line-haul as delivering carrier: 49 USCA Section 20 (11)."

There was no attempt by petitioner or Bickley to prove that Mushroom was the delivering carrier, and there is not a scrap of evidence to support any such conclusion. Indeed, Bickley expressly admitted in paragraph 10 of his affidavit of defense that he was the delivering carrier and expressly

denied that Mushroom was the delivering carrier. The trial judge in his adjudication (311a) stated that Bickley "by an amendment made at the trial . . . denied he was the delivering carrier." This was an inadvertence on the part of the Court because the motion to amend was in fact refused (47a-49a).

It is not disputed that the originating or initial carrier was Goetzman & Newman in Newark, N. Y. Goetzman & Newman delivered the goods to Mushroom in Rochester, N. Y. The reference to Mushroom as the "delivering carrier" in the bill of lading, which was prepared by petitioner, is without significance. The reference is self-serving and inconsistent with the admitted facts as established by the evidence. It is obvious that petitioner merely assumed that Mushroom would carry the shipment to North Wales. When Goetzman & Newman delivered the goods to Mushroom, it issued to Mushroom a waybill covering the shipment which described Mushroom as "connecting line refn." (307a). Mushroom, however, did not deliver the goods to North Wales. Mushroom, in the exercise of its right under the bill of lading "to deliver to another carrier on the route to said destination" (Bill of Lading, 289a), transported the goods to its Philadelphia terminal and there turned them over to the defendant, Bickley. Bickley then delivered the goods to the consignee in North Wales under *its own* waybill, in which were set forth the name of the shipper, Jackson & Perkins; the consignee, Florex Gardens; the number of the articles; their description; their weight and the freight charge. Mushroom was referred to as the "connecting line" (15a, 291a).

The Interstate Commerce Act, 49 U. S. C. A. Sec. 20, paragraph (11), as embraced in the Federal Motor Carriers Act, 49 U. S. C. A. Sec. 319, provides that "the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination".

It is under this section that petitioner contends that Mushroom was the delivering carrier. There cannot be the slightest question concerning the fact that Bickley performed the line-haul service nearest to North Wales, the point of destination. Bickley's participation in the transportation was not limited to a "switching service at the point of destination".

This shipment was consigned from Newark, N. Y., to North Wales. Philadelphia was not the point of destination. Philadelphia does not appear anywhere on the documents. Mushroom was an intermediate, connecting carrier with the right under the bill of lading to deliver the goods to another carrier for ultimate delivery to the consignee. By no stretch of the imagination can Bickley be regarded as furnishing a "switching service" or a mere pick-up and delivery service.

Bickley delivered the goods to the consignee on its own documents. It collected the freight charge and paid Mushroom its proportionate share thereof. There was no contract or arrangement of any kind in effect between Mushroom and Bickley whereby the latter was obliged to render any service to Mushroom as agent or otherwise. Bickley owned its own equipment, paid all the expenses incident to the operation of its business and was completely independent of Mushroom in every way. The evidence affirmatively demonstrates this and there was no proof to the contrary. It is vain for petitioner to assert that Bickley was furnishing a mere pick-up and delivery service or was acting as agent for Mushroom in the face of the incontestable evidence to the contrary.

Moreover, neither petitioner nor Bickley proved or attempted to prove that North Wales was in the terminal area of Philadelphia. They could not have done so had the point occurred to them. The Philadelphia commercial zone is defined by the Interstate Commerce Commission to include an area which excludes Upper Gwynned Township, Montgomery County, in which North Wales is located: Federal Motor

Carriers Act of 1935, Sec. 203 (b) (8), 49 Stat. 546, 49 U. S. C. A., Sec. 303 (b) (8); Order ex parte No. M. C.-6, 17 M. C. C. 533 July 21, 1939; 4 Federal Register 3592; 49 Code of Federal Regulations No. 170, p. 2969; Adjudication, 328a.

See In re: *Harold Pollit Contract Carrier Application;* No. M. C. 92044, July 30, 1942; C.C.H. Federal Carriers Service, Commission Decisions, Paragraph 30,382.01; *Columbia Terminals Company Contract Carrier Application;* No. M. C. 48704, C.C.H. Federal Carriers Service, Paragraph 30,145.01-.02-.03-.04.

We submit that there is not the slightest support in the record for a finding or a conclusion that Mushroom was the delivering carrier. On the contrary, the evidence shows beyond question that Bickley's Auto Express was the delivering carrier.

The petitioner devotes less than a page of its brief to the conclusion that Mushroom was the delivering carrier. It referred only to the case of *Missouri Pacific Rwy. Co. v. Reynolds Grocery Co.*, 268 U. S. 366, in which one carrier *employed* another to perform a *switching service.* It was held that the carrier performing the switching service was not the delivering carrier. Obviously the case has no application under the facts in this case.

Bickley, in its brief filed with your Honorable Court, does not contend that Mushroom is delivering carrier and does not deny that Bickley was the delivering carrier.

The court below was entirely right in deciding that Bickley was the delivering carrier.

CONCLUSION

We respectfully submit that the judgment of the Supreme Court of Pennsylvania is unassailable, that there is no merit in the petition for a writ of certiorari and that the petition should be denied.

Respectfully submitted,

LEMUEL B. SCHOFIELD,

W. BRADLEY WARD,

Attorneys for Mushroom Transportation Company, Inc., one of the Respondents.

AUG 20 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945 No. 214.

JACKSON & PERKINS COMPANY,
Petitioner,

v.

MUSHROOM TRANSPORTATION COMPANY, INC., WILLIAM BICKLEY, Trading as BICKLEY'S AUTO EXPRESS,
Respondents.

REPLY OF WILLIAM BICKLEY, TRADING AS BICKLEY'S AUTO EXPRESS, TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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COUNTER-STATEMENT OF FACTS

The petitioner, the plaintiff in the Pennsylvania jurisdiction, brought a suit in assumpsit against the two defendants named, to recover the sum of $2539.19, the value of certain dormant rosebushes, which were shipped from Newark, N. Y., to North Wales, Pa.

In its statement of claim, the petitioner based its right to recover upon the negligence of the two defendants as follows: "By reason of the negligence of the defendants in not protecting the said goods from cold and their negligent detention and delay in the transportation of the said goods, as aforesaid, the same were on their arrival at point of

destination wholly spoiled and unfit for use, and wholly lost to the plaintiff."

In its statement of claim, the petitioner alleged that either one of the two respondents was the delivering carrier under Section 219 of the Federal Motor Carriers Act. In the trial of the case, as well as in the argument before the Supreme Court of Pennsylvania, and indeed in its argument on the Petition for Writ of Certiorari, the petitioner contended and contends that Mushroom Transportation Company, one of the respondents, was the delivering carrier.

Furthermore, in the statement of claim as filed by the respondents, it was alleged that the goods delivered to the carriers were in a class known as "perishable" and that they were so labeled.

Both of the respondents in their pleadings denied the charge of negligence. On the issue thus framed, the case was tried by a Judge without a Jury, thereby making the Trial Judge both the Court and the Jury.

The case was tried on the theory of negligence of the defendants. The plaintiff, the petitioner here, proved by witnesses that the rosebushes had been delivered to the Mushroom Transportation Company at Rochester, N. Y., and proved that they were delivered by the Mushroom Transportation Company to William Bickley in Philadelphia, who transported them to the consignee named in the bill of lading at North Wales, Pa.

The plaintiff also proved that the rosebushes as packed, would withstand temperatures as low as zero, if not exposed for any great length of time. It was also proven that at no time during the course of transportation did the temperature reach zero.

Both of the defendants offered evidence to prove that they had not been negligent in the management of the shipment or in any delays incident to the transportation.

Both of the defendants had filed tariffs which contained no provisions that their trucks or terminals would be protected by artificial heat. Both defendants assumed the burden of proving that they were not negligent.

The Trial Judge sitting as a Jury found as a fact that neither of the defendants was negligent in the handling of this shipment and found also that the shipment was of "perishable" goods and that they were damaged as a result of an inherent condition of the shipment.

The findings of fact by the Trial Judge were sustained by the Court in banc, on a motion for a new trial.

The Supreme Court of Pennsylvania in its opinion stated the law of Pennsylvania to be that the judgment was entered on the findings of the Trial Judge after they were approved by the Court in banc, and consequently had the effect of a verdict of a Jury.

SUMMARY OF ARGUMENT

(a) The decision of the Supreme Court of Pennsylvania is not contrary and in conflict with the decisions of the United States Supreme Court.

(b) The Supreme Court of Pennsylvania recognized and applied the Acts of Congress and the decisions of the United States Supreme Court applicable to the facts as presented.

(c) The Supreme Court of Pennsylvania and the Trial Court acted in consonance with the Acts of Congress and the decisions of the United States Supreme Court relative to presumptions and burdens of proof.

(d) The case involved purely an issue of fact and the rulings of the Trial Court and the opinion of the Supreme Court of Pennsylvania were in accord with the federal law.

ARGUMENT

The petitioner asks your Honorable Court to grant the writ of Certiorari to the Supreme Court of Pennsylvania first because "the Supreme Court of Pennsylvania ignored the rule that questions of the burden of proof and the quantum of proof necessary to carry that burden are matters of Federal law * * *, and failed to apply the Federal law in determining whether the respondents had exculpated themselves from liability for goods frozen while in transit."

The Supreme Court of Pennsylvania in its opinion said:

> "The transaction is governed by federal law: Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209. The plants were frozen and of no value when delivered to the consignee, facts making a prima facie case against the defendants. The defendants are liable unless the record shows they discharged their obligation to transport and deliver: 49 USCA sections 20 (11) (12)."

The petitioner has cited the case of *Garrett* v. *Moore-McCormack Company*, 317 U. S. 239, in support of its reasons for the issuance of a Certiorari. In that case your Honorable Court stated that the Supreme Court of Pennsylvania sustained the Court in banc and gave judgment n. o. v. "not on appraisal of disputed questions of fact, but because of a conclusion that petitioner had failed to sustain burden of proof required under Pennsylvania law to invalidate release." In that case the Supreme Court of Pennsylvania affirmed the judgment in the belief that the rule as to burden of proof on releases does not affect the substantive rights of the parties, but is merely procedural, and is, therefore, controlled by State law.

In the case at Bar there was no such ruling by either the lower Court or the Supreme Court. Both sides presented all of the evidence obtainable. The plaintiff endeavored to prove that the defendants had been negligent and the defendants answered by proving facts from which the Court found that they had not been negligent. The case as tried presented purely an issue of fact. The Supreme Court of Pennsyl-

vania conceded that the case was controlled by federal law, even to the extent of holding that the burden was on the defendants to exculpate themselves.

It is submitted that this Court will not grant a Certiorari in a case which depended for its ultimate decision upon an issue of fact.

In the case of *Chicago S.W.W.R. Co.* v. *Whitnack Products Co.*, 258 U.S. 369, cited by the petitioner, the suit was against the last carrier and in the discussion of the case your Honorable Court stated common law rule which permitted a "presumption" that the damage occurred on the last carrier, and while seemingly the Carmack Amendment seemed to place liability on the initial carrier, it also provided that nothing therein shall deprive any holder of a bill of lading of any remedy or right of action which he has under existing law. An examination of that case will show that even under the federal law the proof of delivery to the carrier of a cargo in good condition and a receipt by the consignee in poor condition merely raises a presumption of liability. It does not conclusively establish liability of the carrier. The carrier then has the right to offer evidence to rebut such presumption. That is exactly what occurred in this case. The plaintiff was given fully all of its rights under the federal law and there was nothing in the opinion of the lower Court or of the Supreme Court which deprived the plaintiff of any of its substantive rights under the federal law.

The second reason assigned by the petitioners for the writ of Certiorari was that the Supreme Court of Pennsylvania failed to apply the federal rule which requires that after the shipper has proved that the goods left the shipper's control in good condition and arrived in a damaged condition, the carrier must prove that the loss was caused solely and entirely by an excepted peril:—either Act of God, * * * or inherent nature of the goods. It is submitted that the Trial Court was sustained by the Court in banc and the Supreme Court adhered strictly to that federal rule, but found as a fact that the goods arrived in a damaged condi-

tion because of "the inherent nature of the goods." What the inherent nature of the goods was undoubtedly constituted a question of fact and the finding of the Trial Judge that the damage was the result of the inherent nature of the goods was sustained by the Court in banc and, therefore, the Supreme Court again held that such a finding sustained by the Court in banc had the effect of a verdict of a Jury.

At Page 314a of the transcript will be found a statement by the Trial Judge in his Adjudication, stating the common law liability of the carrier. It goes on to state:

> "Inasmuch as this was a shipment in interstate commerce, the federal law controls."

Quoting from *Chesapeake & Ohio Ry. Co.* v. *Thompson Manufacturing Co.*, 270 U.S. 416, said:

> "The federal rule is that 'a carrier is liable for a failure to transport safely goods intrusted to its care, unless the loss or damage was due to one of the specified causes.'"

On Page 329a of the transcript, the Trial Judge in his Adjudication said:

> "From the competent and credible evidence adduced by the defendants, together with the evidence adduced by the plaintiff, we find that the loss in this case was not caused by the failure of defendants to properly perform their duties as common carriers, * * * but was caused by the inherent nature of the goods shipped and natural causes."

In answering the third reason assigned by petitioner it is suggested that as stated it probably is true, but unfortunately the record establishes beyond any question that the Courts of Pennsylvania and especially the Trial Court, specifically applied the federal law respecting the burden of proof.

In answer to the fourth reason it is suggested that the Trial Judge whose findings were sustained by the Court in banc, found as a fact that the goods while in transit were

frozen solely because of prevailing temperatures and that the damage was due to the inherent nature of the shipment and that the defendants had sustained the burden of proof placed upon them by the federal law.

To return this case to the Pennsylvania jurisdiction could only mean a retrial of the same factual issues with the same instructions of law. It would merely amount to giving the petitioner another chance to try its case.

In Paragraph 5 the petitioner again overlooks the record in this case. The Supreme Court of Pennsylvania did not hold that the test of the carrier's liability "is not whether it performs its contract of carriage without negligence but rather, whether it brings itself within the five exceptions to a carrier's liability."

As hereinbefore stated, the Trial Judge in his Adjudication discusses every feature of the case complained about in this petition for a writ of Certiorari. He discusses the question of burden of proof; he discusses the five exceptions referred to in petitioner's petition for a writ of Certiorari, and he found as a fact that the defendants had brought themselves within the five exceptions, and also found as a fact that the goods shipped were "perishable"; and the Supreme Court also held that the burden was on the defendants even though they had brought themselves within one of the five exceptions to prove that they had not been negligent.

Whether or not your Honorable Court would have found in the same way as did the Trial Judge is not the question to be decided, nor is it controlling. The question is, was there any evidence to justify any such finding of fact and it is submitted that there is ample to justify such finding.

It is respectfully submitted that the reasons assigned by the petitioner as the basis for the issuing of the writ of Certiorari cannot be supported by the record in this case. Everything which the petitioner contends was not done by the Supreme Court of Pennsylvania was actually done by the Supreme Court of Pennsylvania.

It is true that in the opinion of the Supreme Court of Pennsylvania the Court stated:

> "We need not discuss plaintiff's argument on the burden of proof; the evidence is in the record; the only question now is whether the law was correctly applied to the evidence. If, on the evidence, a Jury could not find for the defendants, the judgment must be set aside."

In other words the Supreme Court found in effect there was no need to consider the argument on burden of proof because the record disclosed that both sides had tried the case in the light of the federal rule regulating burden of proof.

It is respectfully submitted that the petitioner in the trial of this case and in the argument before the Supreme Court of Pennsylvania endeavored to reverse its own pleadings because in its statement of claim it alleged the goods were perishable; and that the goods were marked perishable; but in the trial of the case and in the argument before the Supreme Court, the petitioner endeavored to withdraw that allegation and argument and contend that the bushes were perishable.

Taking into consideration that these dormant budding rosebushes were wrapped in moss which had been wet for the purpose of keeping alive the roots, and that these rosebushes so wrapped with wet moss were shipped in January during a period of time when the temperature was much below freezing, the only possible result could be that unless carried in heated trucks the moss itself would freeze and consequently freeze the roots of the bushes. This shipment in temperatures below freezing was a shipment of perishable goods. When they were delivered to the plaintiff from California they were kept by the plaintiff in a room with a temperature of about thirty-three degrees and from that temperature they were placed in trucks unheated and operating in weather below freezing (Transcript 79a).

This defendant contends that the rule contended for by the petitioner is confined to ordinary merchandise and has

no application to perishable goods: *Jackson Company* v. *Pennsylvania Railroad Co.*, 112 Pa. Superior Court Reports 535.

This respondent further contends: The *Carmack Amendment to Interstate Com. Act* (49 USCA Section 20) has not increased the common law liability imposed on common carriers: 10 C.J. 132, Section 165. This is strongly emphasized in the case of *Adams Express Co.* v. *Croninger*, 226 U.S. 491, where it was said:

> "What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage, or injury to such property caused by it', or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer, and liable for uncontrollable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, 'any loss or damage', would be to ignore the qualifying words, 'caused by it'. The liability thus imposed is limited to 'any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered'; and plainly implies a liability for some default in its common-law duty as a common carrier".

It is, therefore, respectfully submitted that the petition for writ of Certiorari should be dismissed.

All of which is

Respectfully submitted,

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